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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 272

JUDITH COPLON,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEONARD B. BOUDIN,
Counsel for Petitioner.

August 22, 1951.

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JUDITH COPLON,

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Judith Coplon prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit (R. 78)* in so far as it affirmed petitioner's conviction in the United States District Court for the District of Columbia on charges of espionage and unlawful removal of government papers, and failed unconditionally to grant petitioner's motion for a new trial on the ground of newly discovered evidence.

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* "R" refers to the Transcript in *U. S.* v. *Coplon*, No. 214 this Term, containing the District Court proceedings on the motion for a new trial and all the papers in the Court below; "S. M." refers to the original stenographic mintues of the trial.

Opinions Below

The opinion of the Court of Appeals (R. 60-77) is not yet reported. The opinion of the United States District Court denying petitioner's motion for a new trial (R. 53-58) is reported at 91 F. Supp. 867.

Jurisdiction

The judgment of the Court of Appeals was entered on June 1, 1951 (R. 78), and petitioner's petition for a rehearing and for a modification of the judgment was denied June 29, 1951 (R. 79, 90.) On July 27, 1951, the Chief Justice entered an order extending the time for filing a petition for certiorari to and including August 28, 1951. Jurisdiction of this Court is invoked under Title 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

Questions Presented

1. Whether petitioner's arrest without warrant was in violation of Title 18 U. S. C. § 3052 so as to make inadmissible in evidence against her the papers seized from her person at the time of her arrest, as the Court of Appeals for the Second Circuit held in *U. S.* v. *Coplon*, 185 F. 2d 629 (C. A. 2d, Dec. 5, 1950).

2. Whether petitioner was denied a fair trial under the Fifth and Sixth Amendments to the Constitution of the United States by the trial court's refusal to exclude government employees from the petit jury panel and where a majority of the jury, as ultimately selected, consisted of government and former government employees.

3. Whether the trial judge prejudicially invaded the jury's province by charging it that the papers found upon

petitioner related to national defense under Title 18 U. S. C. § 793.

4. Whether the respondent's illegal wiretapping of petitioner, the concealment thereof and use of the wiretapping issue in summation constituted misconduct under the doctrine of *Berger* v. *U. S.*, 295 U. S. 78.

5. Whether petitioner was improperly precluded from showing that the respondent's investigation, surveillance and arrest of petitioner and seizure of papers upon her person were the result of wiretapping, as required by this court's decision in *Nardone* v. *U. S.*, 308 U. S. 338, and as applied to this case by the Court of Appeals for the Second Circuit in *U. S.* v. *Coplon*, 185 F. 2d 629.

Statutes Involved

18 U. S. C. 3052 provided on March 4, 1949, the date of petitioner's arrest by agents of the Federal Bureau of Investigation:[1]

> "The Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the

[1] On June 27, 1950, the Department of Justice recommended the amendment of Section 3052 to authorize arrests without warrant in the absence of a likelihood of escape (S. Rep. No. 2464, 81st Cong., 2d Sess.). It referred expressly to petitioner's arrest (*id.*). The result was the Act of January 10, 1951, c. 1221, § 1 (Public Law 915, 81st Cong., 2d Sess.), which amended 18 U. S. C. 3052 so as to make it read as follows:

> "The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for felonies cognizable under the laws of the United States, where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony and there is a likelihood of his escaping before a warrant can be obtained for his arrest."

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1103 (47 U. S. C. 605), provides in pertinent part:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *"

Statement

On March 16, 1949, petitioner, a government employee, was indicted in the District of Columbia for espionage and unlawful removal and concealment of government papers in violation of Title 18 U. S. C. §§ 793 and 2071.

Petitioner had been under constant FBI surveillance, including wiretapping approved by the Attorney General, since January, 1949 (see *U. S.* v. *Coplon*, 185 F. 2d 629, 636). Her arrest on March 4, 1949 in New York City was carefully planned by the Department of Justice which had learned through wiretapping four days earlier of her proposed trip (R. 15, 28). The Department accordingly prepared a decoy approved by an Assistant Attorney General, assigned an Assistant to the Attorney General to follow petitioner to New York, increased the number of surveilling agents from seven to twenty-four, and detailed a matron five hours before the arrest to take charge of her. Nevertheless, the arrest by FBI agents and concomitant search and seizure of papers upon which petitioner was convicted were made without a warrant.

Petitioner moved to suppress the use of papers found upon her, on the ground that the arrest without warrant was in violation of Title 18 U. S. C. § 3052, which requires arrest by such agents to be by warrant in the absence of a likelihood of escape before a warrant can be secured; this motion was denied (R. 4). Her motion to challenge the composition of the petit jury on the ground that it was composed in large part of government employees too was denied (S. M. 257). She was tried by a jury of whom eight members were either present or past government employees (S. M. 266-267). During the course of the trial, the government concealed the fact that it had engaged in widespread wiretapping of petitioner's conversations with her counsel and others (R. 5, 12, 28); the government's witnesses, FBI agents, denied that such wiretapping had occurred (R. 30). Government counsel charged in summation that petitioner's "baseless" belief that she was wiretapped showed a "consciousness of guilt" (R. 29).

The Court charged the jury, over petitioner's objections (S. M. 8402, 8404, 8405, 8407, 8415), that the papers found on petitioner related to national defense (S. M. 8362-8363) although that was one of the elements required to be proved by the government. Petitioner was convicted on both counts and sentenced to imprisonment for ten years on the first and three years on the second, to run concurrently (R. 65).

During the pendency of the appeal from this conviction, petitioner was tried in the Southern District of New York under an indictment filed March 10, 1949, charging her with violations of Title 18 U. S. C. §§ 371, 793 and 794. This indictment was based upon the identical facts which supported the indictment herein. The same arrest of petitioner and seizure of papers upon her were involved in the New York case (see *U. S.* v. *Coplon*, 185 F. 2d 629 (C. A. 2d)).

During the course of pretrial proceedings in New York, petitioner learned that the respondent, notwithstanding its denial during the trial herein, had engaged in wiretapping

petitioner (R. 7-14). Accordingly, a motion for a new trial under Rule 33, F. R. Crim. P. was made in the District Court for the District of Columbia. The government did not deny that the motion was timely, that it was based upon newly discovered evidence and that wiretapping had occurred. The District Court summarily denied petitioner's motion for a new trial, as well as her request for a hearing (R. 53-58). An appeal from the District Court's order was consolidated for purposes of argument together with the appeal from the judgment of conviction.

A week after the argument of the consolidated appeal herein, the Court of Appeals for the Second Circuit in *U. S.* v. *Coplon,* 185 F. 2d 629, reversed petitioner's conviction under the New York indictment on the following grounds: (1) that the arrest was illegal because the statutory condition of "likelihood of escape" had not been met by the government; (2) that the trial court had improperly withheld from petitioner certain wiretapping records which might show that wiretapping was the original basis of the government's investigation; and (3) that petitioner was entitled to an examination of those wiretapping records, withheld by the New York trial court on the ground of national security, to show a connection between the government's wiretapping and its evidence.

The court below was immediately apprised of the decision of the Court of Appeals for the Second Circuit. Nevertheless, six months later, it affirmed the judgment of conviction on the ground that the arrest of petitioner and the seizure of papers found upon her person at the time of her arrest were lawful. Although neither it nor the District Court for the District of Columbia had before it the voluminous wiretapping records of the government, the District Court having denied petitioner a hearing, the court below denied petitioner's request for a new trial or for a hearing on the wiretapping issue generally. Instead, it held that if petitioner's conversations with her attorney had been the subject of wiretapping, she was entitled to a new trial. Accordingly, it reversed the order denying the

motion for a new trial and directed the District Court to conduct a hearing as to the existence of such wiretapping and to grant petitioner a new trial if that fact were proved. The existence of precisely that type of wiretapping was admitted by the respondent (R. 87), which has filed a petition for certiorari from the judgment in this respect (*U. S.* v. *Coplon*, No. 214 Oct. Term, 1951).

Reasons Why the Writ Should Be Granted

1. The decision is squarely in conflict with the decision of the Court of Appeals for the Second Circuit in *U. S.* v. *Coplon*, 185 F. 2d 629. That court held this very arrest and search and seizure of petitioner to be in violation of Title 18 U. S. C. § 3052. It ruled that FBI agents were required to meet the two statutory requirements, one of which was the arrestee's likelihood of escape before a warrant could be secured, in order to justify an arrest without warrant. The respondent's petition for certiorari to review the Second Circuit's decision is now pending in this court, No. 4, Oct. Term, 1951.

The court below erroneously construed Title 18 U. S. C. § 3052 in a manner contrary to its plain language, in conflict with the decisions of the Courts of Appeals for the Second and Third Circuits, and applicable decisions of this court. This error consisted in the ruling that (1) FBI agents, acting in their official capacity, could make an arrest not sanctioned by 18 U. S. C. 3052 if a private citizen could arrest under state law; (2) that 18 U. S. C. 3052 relates only to past, not present offenses, and (3) that in the instant case a private citizen could have arrested appellant because a crime was allegedly being committed in his presence.

The statute itself does not justify the lower court's conclusion that FBI agents have powers of arrest different from those prescribed by the single federal law on the subject. Its plain wording makes the likelihood of escape

a condition applicable to *every* case "where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony." Obviously this applies to all past and present offenses,[2] and the attempt to limit it to the former group is in conflict with the plain language of Section 3052.

The argument that FBI agents have arrest powers of private citizens under every state law is neither relevant nor supportable. (1) The arrest herein was made by FBI agents acting in their official capacity following an investigatiton sanctioned by the Attorney General himself upon the basis of information received through such official sources. The arrest was expressly made under 18 U. S. C. 3052. It was based upon information unavailable to any private person. (2) The federal law was passed upon the assumption that FBI agents did not previously have power to make arrests (R. 79-81); the Attorney General had pointed out that "where we find arrests should promptly be made, we have to apply to the local authority * * *." H. Rep. No. 1824, 73d Cong., 2d Sess. (3) The construction urged by the court below would prevent a uniform federal arrest rule—making the powers of these federal officials, unlike others, dependent upon the vagaries of local law.

Every court prior to the court below which has passed upon Section 3052 in this or any other case has recognized that the likelihood of escape condition must be met by the FBI in every case of arrest without warrant. This includes the two District Courts passing upon this very arrest in New York, 89 F. Supp. 142, and in Washington, the Court of Appeals for the Second Circuit in *U. S.* v. *Coplon*, 185 F. 2d 629; *In re Fried*, 161 F. 2d 453, cert. den. 332 U. S. 807, and *U. S.* v. *Haberkorn*, 149 F. 2d 720, and the

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[2] Where Congress intended to authorize federal employees to arrest without warrant for offenses committed in their presence, regardless of likelihood of escape, it has so provided. See 18 U. S. C. 3053, giving marshals this power, as to which the Attorney General said: "It did not want to ask for powers as broad as that" [for FBI agents]. H. Rep. No. 1824, 73d Cong., p. 2.

Third Circuit Court of Appeals in *Bianco* v. *U. S.*, 189 F. 2d 716, C. A. 3d. Indeed, in *U. S.* v. *DiRe*, 332 U. S. 581, this Court cited Section 3052 as an applicable federal law which precluded the operation of state law.

The decision of the court below is contrary to the respondent's own position, repeatedly stated in this and the New York case. It recognized that the arrest herein was made under and pursuant to Section 3052 and that it was required to prove likelihood of escape (R. 82-83). It was not until after the Second Circuit held that there was no likelihood of escape, that the government sought in a supplemental brief herein to argue that the arrest might have been made under state law (R. 82) and that the federal law's requirement of likelihood of escape could be disregarded by the federal arresting officers.[3]

The respondent further recognized that FBI agents must comply with the statutory requirements of Section 3052 by proposing on June 27, 1950 (*prior* to the Second Circuit's decision), that the likelihood of escape condition be removed from the statute (S. Rep. 2464, 81st Cong., 2d Sess.). It expressly predicated its request upon the arrest of petitioner. On September 13, 1950, Senator McCarran, supporting S. 3945, 81st Cong., 2d Sess., embodying the recommendations of the Department of Justice, recognized that FBI powers of arrest were limited (96 Cong. Rec. 14879). The bill became law on January 10, 1951 (Public Law 915, 81st Cong., 2d Sess). The court below inexplicably sought to find support in this statute for its reading of the earlier applicable one; the Committee reports and the brief Congressional discussion show the contrary (R. 85; S. Rep. No. 2464, 81st Cong., 2d Sess.; H. Rep. No. 3228, 81st Cong., 2d Sess.).

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[3] See also the position taken by United States Attorneys in *Suhay* v. *U. S.*, 95 F. 2d 890 (C. A. 10th, 1938) (Appellee's Brief, pp. 3, 7, 55) and in *Barrett* v. *U. S.*, 82 F. 2d 528 (C. A. 7th, 1936) (Appellee's Brief, pp. 4, 34, 50), where it was admitted that "* * * it was necessary for the Government to prove that there was a likelihood of the defendant escaping * * * before they could obtain a warrant for his arrest * * *."

2. The presence of government employees on the petit jury in this case is of importance in the administration of federal criminal law, is in violation of petitioner's rights under the Fifth and Sixth Amendments, and is probably in conflict with this Court's decision in *Dennis* v. *U. S.*, 339 U. S. 162.

Petitioner was a government employee charged with espionage and the removal of government papers with which she was entrusted. In *Dennis* v. *U. S., supra,* Mr. Justice Reed, without whom there would have been no majority, stated in his concurring opinion that government employees might be banned from a jury "when circumstances are properly brought to the court's attention which convince the court that government employees would not be suitable jurors in a particular case." These words are more applicable to the present case than to any one which has thus far arisen or might conceivably arise.

By the time of petitioner's trial, Executive Order 9385 had been in effect two years. The impact of the government's loyalty program upon government employees was, by that time, notorious. See *Bailey* v. *Richardson,* 341 U. S. 918. Accordingly, petitioner has met the test laid down by Mr. Justice Reed in the *Dennis* case when he referred to the requirement of "evidence of a climate of opinion among Government employees that they would jeopardize their tenure or provoke investigation by such a verdict."

3. The trial court invaded the jury's province by charging it that the papers found upon petitioner related to national defense under Title 18 U. S. C. 793 (S. M. 8362, 8363). This critical instruction was in square conflict with this Court's ruling in *Gorin* v. *U. S.*, 312 U. S. 19, 32: "The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined." The court below upheld the "charge to the jury" without comment (R. 70).

4. The court below ordered a hearing to determine whether the prosecution had wiretapped conversations between petitioner and her counsel (R. 78). Since the record already shows the existence of that type of wiretapping (R. 87), a new trial will occur if this Court denies the respondent's petition for certiorari herein or affirms the Court of Appeals on this point.

However, full protection of petitioner requires that if this Court review the respondent's petition, it simultaneously consider the failure of the Court below to apply this Court's decision in *Berger* v. *U. S.*, 295 U. S. 78, to another aspect of this case. We refer to (a) the prosecution's concealment from the court and defense counsel of the fact that FBI agents, members of the government's legal staff,[4] engaged in wiretapping; (b) the false statements of the government's FBI witnesses, necessarily known to the prosecution; and (c) the government's use of the wiretapping issue in summation before the jury.

5. Petitioner is also entitled under *Nardone* v. *U. S.*, 308 U. S. 338, to a District Court hearing to determine whether the government's investigation, surveillance, arrest and seizure of petitioner were the result of wiretapping. The failure of the court below to direct this hearing is in conflict with the decision of the Court of Appeals for the Second Circuit in *U. S.* v. *Coplon*, 185 F. 2d 629.

Further, since the wiretapping material was in the record before the Second Circuit, the court below had no basis for rejecting the Second Circuit's conclusion that appellant had a right to examine the wiretapping material withheld from her in the New York case. The court below should have either followed the Second Circuit's informed decision or granted a similar hearing.

6. The court below created a serious problem for petitioner when, although upon a single issue it reversed the

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[4] Brief for the United States, p. 1, *United States* v. *Cotton Valley Operators Committee, et al.*, 339 U. S. 940.

order denying petitioner's motion for a new trial, it simultaneously acted adversely upon the appeal from the judgment of conviction. If this direction of the court below for a hearing is sustained, the hearing would in all likelihood result in a new trial, making it unnecessary for this Court to pass upon the issues raised by this petition. But since petitioner can have no assurance that a hearing will be held and if so that it will result in a new trial, she is required to file this petition for certiorari. This Court, under the circumstances, may prefer to deny the government's petition for certiorari in No. 214, and, upon its own motion defer consideration of this petition until the motion for a new trial has been decided. A District Court order granting petitioner a new trial will eliminate the necessity for this Court's consideration of the numerous issues involved herein.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD B. BOUDIN,
Counsel for Petitioner.

August 22, 1951.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 60-77[1]) is reported at 191 F. 2d 749.

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[1] The reference "R" is to the printed record in No. 214, *United States* v. *Coplon*, which is before the Court on the Government's petition for certiorari to review the judgment of the Court of Appeals reversing the District Court's order denying petitioner's motion for a new trial on the ground of newly discovered evidence and remanding the case for a hearing on the motion with directions to grant a new trial if it should appear that telephone conversations between petitioner and her counsel were intercepted by government agents. Since the record in the instant case has not been printed, for convenience we adopt petitioner's method (see Pet. 1, fn.) of referring to those parts of the printed record in No. 214 which are common to this case. The reference "Tr." herein refers to the stenographic transcript of record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1951 (R. 78), and a petition for rehearing and modification of the judgment (R. 79-90) was denied on June 29, 1951 (R. 90). On July 27, 1951, the Chief Justice entered an order extending the time for filing a petition for certiorari to and including August 28, 1951, and the petition was filed on August 24. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner's arrest without a warrant was lawful, so as to make admissible in evidence against her the documents seized from her person at the time of her arrest.

2. Whether the Court of Appeals erred in not directing a hearing on the issue of wiretapping in conformity with the Second Circuit's intervening decision in the New York case.

3. Whether the initial failure of the government to disclose that petitioner's telephone conversations had been intercepted was in any way prejudicial to her.

4. Whether the presence of government employees and former government employees on the trial jury violated petitioner's rights under the Fifth or Sixth Amendments.

5. Whether the trial court erred in instructing the jury that the documents found on petitioner

at the time of her arrest related to the national defense.

STATUTES INVOLVED

18 U.S.C. 793 reads in pertinent part:

> Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation * * *
>
> * * * copies, takes, makes, or obtains, or attempts, to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; * * *
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 2071 provides:

> (a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

> (b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.

18 U.S.C. 3052 provided on March 4, 1949, the date of petitioner's arrest:

> The Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for felonies cognizable under the laws of the United States, where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony and there is a likelihood of his escaping before a warrant can be obtained for his arrest.[2]

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[2] The Act of January 10, 1951, c. 1221, § 1 (Public Law 915, 81st Cong., 2d sess.), amended 18 U.S.C. 3052 so as to make it read as follows:

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (47 U.S.C. 605), provides in pertinent part:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *

Act of August 22, 1935, c. 605, 49 Stat. 682; D. C. Code 1940, Section 11-1420, reads in pertinent part as follows:

> All other persons [other than those described in the first paragraph of this section], otherwise qualified according to law whether employed in the service of the Government of the United States or of the District of Columbia, all officers and enlisted men of the National Guard of the District of Columbia, both active and retired, all officers and enlisted men of the Military, Naval, Marine, and Coast Guard Reserve Corps of the United States, all notaries public, all postmasters and those who are the recipients or beneficiaries of a pension or other gratuity from the Federal or District Government or who have contracts with the United States or the District of Columbia, shall be qualified to serve as jurors in the District of Columbia and shall not be exempt from such service: *Provided*, That employees of the Government of the United States or of the District of Columbia in active service who are called upon to sit on juries shall not be paid

for such jury service but their salary shall not be diminished during their term of service by virtue of such service, nor shall such period of service be deducted from any leave of absence authorized by law.

STATEMENT

Petitioner, a former employee of the Department of Justice, was convicted in the District Court for the District of Columbia on a two-count indictment charging (1) that she copied and obtained intelligence reports of the Department of Justice relating to espionage activities, with intent and reason to believe that the information would be used to the advantage of a foreign power, in violation of 18 U.S.C. 793, and (2) that she removed from the Department of Justice summaries of F.B.I. reports relating to counter espionage activities, in violation of 18 U.S.C. 2071. She was sentenced to imprisonment for 10 years on the first count and 3 years on the second count, the sentences to run concurrently (R. 61).

Before the trial, during the choosing of the jury, petitioner objected to the seating of government employees. Without conceding the validity of the objection, government counsel, out of an abundance of caution, offered to agree that no government employee should be called for jury service in this case. Petitioner refused this offer. (Tr. April 25, 1949, pp. 114-117.) The trial court also offered to direct the clerk to call only persons who were

not government employees. Petitioner likewise refused this suggestion. (Tr., April 25, 1949, pp. 129-130.) Petitioner's later challenge to the panel, before the exercise of peremptory challenges, on the ground that the panel was composed in large part of government employees, was denied by the court (Tr., April 26, pp. 256-257).

The facts as to petitioner's arrest and the other evidence supporting her conviction are set forth in the opinion of the court below (R. 61-64), in the earlier opinion of the Second Circuit in *United States* v. *Coplon,* 185 F. 2d 629, and in our petition for certiorari to review the Second Circuit's judgment (No. 4), and need not be repeated here.

In affirming the conviction, the court below refused to follow the intervening ruling of the Second Circuit to the effect that F.B.I. agents had no authority to arrest without a warrant, even for a felony committed in their presence, unless they had reason to believe that the person they had arrested was about to escape.

Petitioner had been convicted in the District of Columbia prior to her trial and conviction in New York. While her appeal from the conviction in the District of Columbia was pending, she moved for a new trial in the District Court, presenting to that court by affidavit some of the evidence relating to wiretapping by government agents which had been developed at a pretrial hearing in the New York case (R. 1-18, 20-42). The District

Court denied the motion for a new trial, holding, as had the District Court in New York, that the Government's proof of petitioner's guilt was obtained independently of the wiretapping (R. 53-58).

On petitioner's separate appeal from the order denying the motion for a new trial, the court below sustained this ruling of the District Court. A majority of the Court of Appeals held, however, that in view of petitioner's allegations that F.B.I. agents had intercepted telephone conversations between her and her counsel before and during her trial in the District of Columbia, a further hearing on that issue was necessary; and that, if it should be established upon such hearing that such interceptions of conversations with counsel had been made, petitioner is entitled to a new trial on the ground that she had been denied her constitutional right to the effective assistance of counsel, regardless of the nature of the conversations overheard or the degree of prejudice resulting therefrom (R. 75-76). The Government seeks review of this latter ruling in No. 214.

ARGUMENT

1. In view of the clear conflict between the decision below and the decision of the Second Circuit as to the legality of petitioner's arrest, we do not oppose the present petition on that score. The Government also seeks review of this issue in No. 4.

2. In the New York case, the Second Circuit held that the trial judge had erred in the pretrial hearing, by examining *in camera* certain records of the wiretapping of telephones used by Miss Coplon, and by restricting the cross-examination of certain F.B.I. agents on the question of whether the Government's original clue in this case was obtained by wiretapping.

In No. 4, the Government seeks reversal of these rulings, principally on the ground that it was affirmatively established that the Government had obtained its proof from sources independent of wiretapping (see Pet., No. 4, pp. 29-40).

In the instant case, the court below sustained this position and accordingly refused to direct a hearing on the question of wiretapping (R. 70-71). The court thus indicated that it did not consider a hearing necessary where it is apparent that the evidence adduced was also derived from sources independent of wiretapping. This holding cannot be reconciled with the Second Circuit's view that, in any event, once wiretapping is established, the defendant must be permitted to examine all records of such wiretapping and an opportunity to inquire into the nature of the Government's original clue. In view of this conflict, we do not oppose the petition on this issue.

The Government does oppose the petition, however, with respect to the remaining questions presented.

3. Petitioner apparently contends that she was prejudiced by the alleged concealment by the government of the fact that her telephone conversations had been intercepted. However, it is clear that the alleged concealment no longer can have any material bearing upon the disposition of this case. The motion for a new trial brought before the District Court the evidence on which petitioner relies to show that the Government's proof was based upon wiretapping. If the District Court and the Court of Appeals were, as we maintain, correct in holding that none of the Government's proof was obtained by wiretapping, petitioner was not prejudiced by the failure to disclose the fact of wiretapping during trial of the instant case. If, on the contrary, these rulings should be reversed and it should now be held that part of the Government's proof was obtained solely by wiretapping, petitioner would be entitled to a new trial irrespective of the alleged absence of a full disclosure at the original trial. Thus, the determination as to whether any of the Government's evidence was or was not obtained solely by wiretapping, a point on which we have not opposed certiorari, will deprive the issue under consideration of any significance.

Also, the prosecutor's reference to wiretapping during summation to the jury, about which petitioner complains (Pet. 5, 11), is far from invoking the rule of *Berger* v. *United States*, 295 U.S. 78.

The allusion, if improper, was clearly harmless error in view of evidence so overwhelming that the Court of Appeals for the Second Circuit concluded that "the guilt is plain". *United States* v. *Coplon*, 185 F. 2d 629, 640.

4. We think it is a sufficient answer to petitioner's contention (Pet. 2, 10) that she was denied a fair trial by reason of the presence of government and former government employees on the jury,[3] to point out that by her own action she prevented the selection of a jury composed of non-government employees, and thus waived any objection she might otherwise have as to the presence of government employees on the jury as it was finally constituted. The following colloquy took place at the time the jury was being selected (Tr., April 25, 1949, pp. 114-117):

> Mr. Kelley [counsel for the Government]. * * * With respect to the petit jury to be drawn in this case, without yielding on principle under those authorities we cited this morning, which would govern both as to grand jury and petit jury, the government, out of an abundance of caution, is prepared in this case to stipulate that any juror called to the box (who) may be an employee of the Federal Government or the District of Columbia may be deemed to be challenged for cause properly.

[3] The trial jury consisted of five government employees, two former government employees (Tr. 247, 249) and five other persons not employed by the government (Tr. 218, 223, 233, 235, 242).

I would like to say at this time for the record, however, that in offering to so stipulate in this case the Government is mindful of the facts peculiar to this case, that the Defendant, a Government employee, is charged with espionage and disloyalty, and so the record may be fully clear in so offering to stipulate, the Government does not suggest that that stipulation may be used henceforth in cases not involving the facts peculiar to this case. In other words, no precedent is intended to be [e]stablished in so far as Government employees are concerned save in this case where the employee herself was with the Federal Government and wherein the case involves espionage and disloyalty.

We make that tender of stipulation.

Mr. Palmer [counsel for petitioner]. That tender, in my estimation, has come too late.

One of the things my friend passed by in connection with the statement that he wants to stipulate now in a jury to be picked from this panel, that so far as he is concerned, he is going to establish a new precedent for this case, which the papers have been full of, and I say to Your Honor, please, in the first place he has no power to make such a stipulation because the cases have held that where people involved with the Government attempt to make a settlement, income tax where fraud is involved, that no matter what settlement a Government agent has offered to make, he cannot make a settlement of any kind if the Attorney General's office says a crime has been committed.

Secondly, he has overlooked the main point here.

My main point in the beginning was that the grand jury that indicted her was made up of less than the requisite 12 if you exclude the Government. We say we do not want to be treated any differently than anyone else. We are no better or no worse than anybody else in the country. We are entitled to our rights.[4]

If this panel was improperly drawn for the petit jury, how can the Attorney General be allowed to go ahead and waive the requirement? If the law says that that grand jury was improperly drawn and the petit jury is improperly drawn, then they were drawn improperly and no such concession, as far as I am concerned, will be of any avail.

* * * We do not accept such a concession. We say they were illegally drawn. We say we want to challenge the entire panel that has been sent to this court room for cause. The issue is before the Court.

A few minutes later, counsel for petitioner refused a similar offer by the court (Tr., April 25, 1949, pp. 129-130):

However, since counsel had made the suggestion, I think it is my duty, if it is desired by counsel, to direct the Clerk to bring in here

---

[4] The presence of government employees on the grand jury is not pressed in the petition for certiorari.

> for jury service in this case only persons who are not Government employees.
>
> * * * * *
>
> The Court. As I understand, you do not accept the suggestion? You are not asking that the Clerk bring in non-government employees?
>
> Mr. Palmer. No.

It is difficult to imagine what petitioner hoped to gain by refusing to accept this suggestion, other than the creation of the very situation about which she now complains. A similar situation of waiver, but certainly not as clear as the one in the instant case, occurred in *Frazier* v. *United States*, 335 U.S. 497. There the defendant used his ten peremptory challenges to exclude non-government employees from the jury, thus creating a situation where all of the jurors finally seated were government employees. This Court said (p. 507):

> * * * we are not willing to join in repudiating the consequences of [the petitioner's] own selection. We take petitioner at his word as expressed by his repeated choices. The fact that he exercised his peremptory challenges as he did, so frequently and consistently to eliminate privately employed jurors and retain only Government employees, hardly can be said to give cause for him to claim overweighting of the jury with Government employees. There was no defect of the panel in this respect. Nor is there any claim or basis

> for one that the prosecution utilized its peremptory challenges to bring about a jury constituted only of them. It would be going very far to say that in the circumstances shown by this record petitioner was deprived, either in law or in fact, of an impartial jury or indeed of one fairly representative of the community. If deprivation there was, even in the latter sense, it was the result of his own choice, not of imperfection in the choices tendered him by law or in the procedures of selection afforded.

Cf. *Adams* v. *United States ex rel. McCann,* 317 U.S. 269; *Patton* v. *United States,* 281 U.S. 276.

As to former and retired government employees acting as jurors in this or any other criminal case, it is clear that none of the considerations referred to by this Court in *Dennis* v. *United States,* 339 U.S. 162, are present.

5. Petitioner argues (Pet. 10) that the trial court erred in instructing the jury that the papers found on her at the time of her arrest related to the national defense.

There is no dispute, however, as to the nature of these papers. Nor did petitioner offer any evidence or argument at the trial to contradict the allegation that they did relate to national defense. Such reports of the Department of Justice relating to counter intelligence activities fall directly within this Court's description of similar information in *Gorin* v. *United States,* 312 U.S. 19, 28-29:

> * * * National defense, the Government maintains "is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." We agree that the words "national defense" in the Espionage Act carry that meaning.
>
> * * * * *
>
> * * * A foreign government in possession of this information would be in a position to use it either for itself, in following the movements of the agents reported upon, or as a check upon this country's efficiency in ferreting out foreign espionage. It could use the reports to advise the state of the persons involved of the surveillance exercised by the United States over the movements of these foreign citizens. The reports, in short, are a part of this nation's plan for armed defense. The part relating to espionage and counter-espionage cannot be viewed as separated from the whole.

The papers found in petitioner's purse clearly indicated on their face that they dealt with Department of Justice information concerning the activities of Russian agents. This is the same kind of information that the Court in the *Gorin* case held to be included in the words "connected with the national defense." It is true that in the *Gorin* case the Court held that the issue whether the information involved related to the national defense was properly submitted to the jury and re-

jected the petitioner's claim there that the trial court should have decided the question as a matter of law. In that case, however, the papers involved were innocuous on their face and ambiguous as to their character on first impression. In describing those papers, the Ninth Circuit said (111 F. 2d 712, 716):

> * * * Most of them, on their face, appear innocuous, there being no way to connect them with other material which the Naval Intelligence may have, so that the importance of the reports does not appear.

As stated above, this is not true in the instant case.

Secondly, at the time of the *Gorin* case there had been no definitive pronouncement by this Court as to the meaning of "information respecting the national defense." Coupled with the dispute raised in that case as to the character of the papers themselves as relating to national defense, the lack of decisions by this Court on this issue made it proper for the trial court to refuse to decide it as a matter of law.

But in the present case, as we have shown, there was no dispute at the trial as to the character or content of the papers found on petitioner. Falling as they did within the description in the *Gorin* case, there remained no question of fact for the jury to decide, and it was proper for the court to instruct the jury that as a matter of law these papers related to the national defense. This Court

has repeatedly held that where facts are not in controversy, the trial court may, without infringing upon the jury's province, instruct the jury as to the meaning the law gives to such facts. *Rosen* v. *United States,* 161 U.S. 29; *Sparf and Hansen* v. *United States,* 156 U.S. 51, 99, 100; *Marshall* v. *Hubbard,* 117 U.S. 415, 419; *Montclair* v. *Dana,* 107 U. S. 162; *Pleasant* v. *Fant,* 22 Wall. 116, 121. The Court in the *Rosen* case said (pp. 42-43):

> It is also assigned for error that the court left it to the jury to say whether the paper in question was obscene, when it was for the court, as a matter of law, to determine that question. If the court had instructed the jury as a matter of law that the paper described in the indictment was obscene, lewd, and lascivious, no error would have been committed; for the paper itself was in evidence; it was of the class excluded from the mails; and there was no dispute as to its contents. It has long been the settled doctrine of this court that the evidence before the jury, if clear and uncontradicted upon any issue made by the parties, presented a question of law, in respect of which the court could, without usurping the functions of the jury, instruct them as to the principles applicable to the case made by such evidence.

CONCLUSION

For the reasons stated above, we do not oppose certiorari on the first two questions as we have stated them (*supra,* p. 2). The petition should in all other respects be denied.

Respectfully submitted.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 272

JUDITH COPLON,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITIONER'S REPLY MEMORANDUM

LEONARD B. BOUDIN,
Counsel for Petitioner.

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1. The Government asserts that the trial court correctly charged the jury that the papers involved were documents connected with the national defense. It argues that (1) there was no dispute with respect to the "nature of these papers" and (2) petitioner did not offer "evidence or argument at the trial" to "contradict the *allegation* that they did relate to national defense" (emphasis supplied) (Br. 15).

The Government's position is somewhat different here from that taken in the court below, for there, while it did say *en passant* that the facts were indisputable (C. A. Br. 54, 56), its principal argument was that the trial judge had left for the jury the determination of all factual issues including connection with national defense (C. A. Br. 53-55), an argument not supported by the evidence (S. M. 8318-8321, 8362-8363).

Petitioner has always asserted that the papers involved do not pertain to the national defense. The Government's argument that the petitioner was under a duty to "contradict" the Government's "allegation" is certainly not the law.

However, petitioner requested the trial judge to charge that she could not be convicted in the absence of proof that they pertained to the national defense (S. M. 8318-8321). When the trial judge ruled to the contrary (S. M. 8362-8363), she objected (S. M. 8378, 8382, 8402, 8405, 8407).

The Government's main argument is that a trial judge has the right to decide an issue of fact in a criminal case. On the contrary, it is the court's duty to define the elements of the crime and the jury's duty to determine every issue of fact.

> *United Brotherhood of Carpenters* v. *U. S.*, 330 U. S. 395.
> *Fleischman* v. *U. S.*, 174 F. 2d 519, rev'd on other grounds, 339 U. S. 349.
> *U. S.* v. *Gollin*, 166 F. 2d 123, cert. den. 333 U. S. 875.
> *Kenion* v. *Gill*, 155 F. 2d 176.
> *Morris* v. *U. S.*, 156 F. 2d 525, 530.
> *U. S.* v. *Raub*, 177 F. 2d 312.
> *Carothers* v. *U. S.*, 161 F. 2d 718 (C. A. S.).
> *Konda* v. *U. S.*, 166 F. 2d 718.

This Court applied this principle in *Gorin* v. *U. S.*, 312 U. S. 19, 28-29, involving the same statute. We do not understand the Government's present argument that the jury's finding in the *Gorin* case—that the papers there involved pertained to the national defense—made the papers herein national defense papers as a matter of law (Br. 17). Nor is the Government correct in suggesting that the *Gorin* papers were innocuous as compared to those herein involved. This Court described the *Gorin* papers as "a detailed picture of the counter-espionage work of the naval intelligence drawn from its own files" (312 U. S. at 29) and stated that "they must be considered as dealing with the activities of the military forces" (*ibid.*). It is ludicrous to suggest that although the *Gorin* papers deal-

ing with military matters presented an issue of fact for the jury, the trial court herein could rule that the *Coplon* papers were connected with the national defense. On the contrary, the trial court, in the absence of the jury, had earlier described certain of the papers, which the Government claimed should be excluded because of national security, as "somewhat cryptic and * * * practically unrelated. They do not suggest danger to our national security or our national defense" (S. M. 5008).

The cases cited by the Government (Br. 18) fall into two categories. The first, of which *Rosen* v. *U. S.*, 161 U. S. 29, is an example, involves a defendant's request for a charge as to the evidence. A defendant in a criminal case is in a position to move for a directed verdict of acquittal; this does not permit the Government to move for judgment of conviction. Thus, in *Sparf* v. *U. S.*, 156 U. S. 51, 106-7, this Court emphasized that "the jury were the exclusive judges of the facts."

The second category of cases involved civil law suits. There again the rule is different, since the trial judge may direct a verdict in favor of either party if the facts are indisputable and may set aside the jury's verdict if it is against the weight of the evidence. Neither of these powers exists in the trial judge in a criminal case before a jury.

In its argument before this Court in the *Gorin* case, the Government thus successfully disposed of its present argument:

> "In the first place, the result would be an almost revolutionary narrowing of the jury's function. It is probable that the petitioner's argument proceeds from the premise that since the primary facts are not in dispute, it is the duty of the judge, as a matter of law, to determine the ultimate conclusion flowing from those facts. But it has been settled in a host of situations that the jury must find not only the primary facts but also the ultimate conclusion" (Br. 34).

2. The Government says that defense counsel's failure to accept its stipulation that government employees might be challenged for cause constituted a waiver of the right to challenge the composition of the jury.

The Government's proposal was of course limited to present employees. It did not include the former and retired government employees who were on the panel, some of whom ultimately became members of the jury. The facts which the Government described as "peculiar to this case" (S. M. 114-117)* justified a finding of inherent bias in all three categories of government employees, not merely the one to which its proposed stipulation was limited.

Further, counsel was under no duty to enter into a stipulation with the Government. The defense had objected to the entire panel of petit jurors as well as to the grand jury itself. It expressly stated that to enter into the suggested stipulation would mean waiving its other objections (S. M. 130). It was not incumbent upon it to accept a limited Government stipulation giving it a partial immediate gain but requiring the withdrawal of other objections.

Neither the Government nor the trial court was prejudiced by the petitioner's refusal to enter into a stipulation. The court could have excused all government employees without either agreement or motion of defense counsel. It had that opportunity again when defense counsel formally requested that the court exclude from the panel "all persons who work for the Government or who have retired from the United States Government or are receiving pensions as retired persons from the United States Government" (S. M. 255-256). The motion was denied "As to each and everyone" (S. M. 257).

3. The Government argues that its concealment of the wiretapping is "no longer" material because that violation of law has now been discovered and is before this Court

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* The references on this subject are to the pre-trial proceedings of April 25 and 26, 1949.

on the principal wiretapping issues raised by the Government's petition. This attempt to isolate the concealment at the trial of the wiretapping from its use before the trial is unfair and unrealistic. The objectionable conduct at the trial did not consist alone in a failure to admit upon inquiry the existence of wiretapping. It included obstruction of petitioner's efforts to elicit such information from Government counsel and witnesses, bland evasions by the former, and perjury on the part of FBI agents, members of the Government's legal staff, who denied knowledge of such wiretapping (see *U. S.* v. *Coplon*, No. 214 this Term, R. 28-35). The apex was reached in the prosecution's summation which attributed to petitioner a "consciousness of guilt" because of her expressed fear of wiretapping (S. M. 8182). It is this behavior at the trial which calls for the application of *Berger* v. *U. S.*, 295 U. S. 78 even if *Nardone* v. *U. S.*, 308 U. S. 338 were inapplicable.

This was simply not a fair trial, and no attempt to isolate one element from another can make it appear in that light. Respondent refers to the *obiter dictum* of the Second Circuit as to petitioner's alleged guilt, to justify a claim of harmless error. The remark is plainly irrelevant, since it was made with respect to a different trial under a different indictment; the defendant therein offered no evidence at the close of the Government's case for reasons not relevant herein. In any event, a criminal trial permeated by unfairness cannot be sanctified by anyone's opinion as to the guilt of the aggrieved defendant.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD B. BOUDIN,
Counsel for Petitioner.

Dated: January 21, 1952.